

A **Malaysia Airlines Bhd (according to Malaysia Airline System**
Berhad (Administration) Act 2015) v Tan Wei Hong (a child
B **suing through his guardian ad litem and next friend, Chuang**
Yin E) & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
W-02(IM)(NCVC)-737-04 OF 2016

C ROHANA YUSUF, IDRUS HARUN AND MARY LIM JJCA
20 DECEMBER 2016

D *Damages — Claim — Liability — Claim by family members of passengers of*
MH370 — Incorporation of new entity of MAS — Whether new entity liable for
missing flight since they took over eight months after flight went missing
— Whether new entity wrongfully impleaded by claimants' claim — Whether
claimants' claim disclosed reasonable cause of action recognised in law — Whether
E *frivolous, vexatious and abuse of court process — Malaysian Airline System*
Berhad (Administration) Act 2015

F Tan Ah Meng, Chuang Hsiu Ling and Tan Wei Chew ('the first, second and
third deceased persons') were passengers on board flight MH370 which was
operated by the appellant ('MAS'). The first and second respondents were the
natural sons of the first deceased person whereas the third and fourth
respondents were the parents of the first deceased person. The fifth respondent
was the mother of the second deceased person. As fate would have it, the flight
that in the normal course would be uneventful never arrived at the destination
and to date the aircraft, all its passengers and crew personnel on board have not
G been located. The respondents commenced an action at the High Court
against the appellant, the first, third, fourth and fifth defendants. It was the
respondents' pleaded case that the appellant, pursuant to the Malaysian Airline
System Berhad (Administration) Act 2015 ('Act 765') was deemed to have and
will be taking over all liabilities of MAS. Based on the respondents' claim, the
H liabilities of MAS were premised on a breach of contract and a breach of duty
of care. The respondents sought from the appellant and MAS, third, fourth and
fifth defendants general damages, aggravated and exemplary damages as well as
damages to be assessed for the loss of support suffered by the respondents as a
result of the death of the first and second deceased persons pursuant to s 7 of the
I Civil Law Act 1956 or common law. The appellant filed an application
pursuant to O 18 r 19 of the Rules of Court 2012 and the inherent jurisdiction
of the High Court to strike out the respondents' writ of summons and
statement of claim on the basis that the respondents had no cause of action
against the appellant and that the claim against the appellant was frivolous,

vexatious and an abuse of the process of the court. The application was based on the argument that the appellant was an entity incorporated on 7 November 2014, eight months after the occurrence of the incident involving flight MH370, that it was not referred to as a successor company of MAS under Act 765 and the transfer of assets and liabilities from MAS to the appellant as envisaged under Act 765 is limited to specific assets and liabilities that MAS and the appellant have agreed as being subject to transfer. The assets and liabilities so specified exclude the liabilities arising from the loss of flight MH370. The High Court dismissed the appellant's application on the grounds that the appellant's relationship with MAS as to whether it would wholly or partly assume MAS liabilities was not clear. Hence, the present appeal.

Held, allowing the appeal; setting aside the order of High Court:

- (1) The respondents' reliance on the fifth paragraph of the preamble to Act 765 to justify impleading the appellant as a party in this action was clearly misplaced as much as it is wholly untenable. The preamble was useful or may be used as a guide to the legislative intention of any statute. It is often of great assistance in construing a statute. The preamble is a key to open the minds of the makers of the Act of Parliament. The preamble indicates the mischiefs which the legislation intends to redress (see paras 10–11).
- (2) Even if the preamble of Act 765 is not an operating part thereof, for the purpose of determining the legislative intent of Act 765, the preamble ought not to be read in isolation, it should instead be read in totality and consonant with the purpose for which Act 765 has been enacted by Parliament. When this is done, it becomes clear that the purpose of Act 765 is to establish the appellant so that it, amongst others, can ensure continuity etc and assume certain assets and liabilities of MAS. Act 765 requires that such assumption of certain assets and liabilities by the appellant will be carried out in an effective, efficient and seamless means by way of a vesting order (see para 11).
- (3) No such liabilities in connection with MH370 has been vested in or transferred to the appellant pursuant to the vesting order in question as contended or alleged by the respondents. This was also consonant with the agreement between MAS and the appellant where it was expressly agreed, inter alia, that the appellant shall not assume any liabilities including any claims arising from the loss of MH370 (see para 12).
- (4) The appellant's complaint is that it has been wrongfully impleaded in this action stressing that the respondents' claim against the appellant discloses no cause of action recognised in law and that it is frivolous, vexatious and an abuse of court process. No liability has been established or determined against MAS with regard to the loss of MH370, so no liability could therefore be transferred, assigned or vested in the appellant. The alleged

- A liability of MAS, was not assumed or acknowledged liability which was subject to a transfer to or vesting in the appellant (see paras 13–14).
- (5) The High Court judge erred in assuming that MAS would necessarily cease to exist, that contrary to the vesting order and the agreement, the liability in this case had been or could be transferred to or vested in the appellant and that the potential consequences to the respondents of MAS's ceasing to exist was a factor to be taken into account in deciding whether the claim should be struck out (see para 22).
- B
- (6) The appellant had convincingly established that the respondents have wrongly impleaded them in this action and the respondents' attempt to refute this fact was completely unconvincing. It was obvious that this action against the appellant was eminently one that was plainly unsustainable and had no chance of success (see para 24).
- C

D **[Bahasa Malaysia summary]**

- Tan Ah Meng, Chuang Hsiu Ling dan Tan Wei Chew ('si mati pertama, kedua dan ketiga') adalah penumpang-penumpang penerbangan MH370 yang dikendalikan oleh perayu ('MAS'). Responden pertama dan kedua adalah anak lelaki si mati pertama manakala responden-responden ketiga dan keempat adalah ibu bapa si mati pertama. Responden kelima ialah ibu kepada si mati kedua. Oleh sebab nasib, penerbangan yang dalam perjalanan biasanya lancar tidak pernah tiba di destinasi dan sehingga kini pesawat, semua penumpang dan kakitangan anak kapal masih belum ditemui. Responden-responden telah memulakan tindakan di Mahkamah Tinggi terhadap perayu, defendan-defendan pertama, ketiga, keempat dan kelima. Ia adalah kes yang dipli responden-responden bahawa perayu, menurut Akta Sistem Penerbangan Malaysia Berhad (Pentadbiran) 2015 ('Akta 765') dianggap telah dan akan menanggung semua liabiliti MAS. Berdasarkan tuntutan responden-responden, liabiliti MAS berasaskan pelanggaran kontrak dan pelanggaran kewajipan berjaga-jaga. Responden-responden memohon daripada perayu dan MAS, defendan-defendan ketiga, keempat dan kelima ganti rugi am, ganti rugi tambahan dan teladan juga ganti rugi untuk menaksir kehilangan sokongan yang dialami oleh responden-responden akibat kematian si mati pertama dan kedua menurut s 7 Akta Undang-Undang Sivil 1956 atau *common law*. Perayu telah memfailkan permohonan menurut A 18 k 19 Kaedah-Kaedah Mahkamah 2012 dan bidang kuasa sedia ada Mahkamah Tinggi untuk membatalkan writ saman dan pernyataan tuntutan responden-responden berasaskan bahawa responden-responden tiada kausa tindakan terhadap perayu dan bahawa tuntutan terhadap perayu adalah remeh, menyusahkan dan satu penyalahgunaan proses mahkamah. Permohonan itu adalah berdasarkan hujah bahawa perayu suatu entiti yang diperbadankan pada 7 November 2014, lapan bulan selepas berlaku kejadian melibatkan penerbangan MH370, bahawa ia tidak dirujuk sebagai syarikat pengganti MAS di bawah Akta 765 dan pemindahan aset dan liabiliti daripada MAS
- E
- F
- G
- H
- I

kepada perayu sepertiamana termaktub di bawah Akta 765 adalah terhadap kepada aset dan liabiliti spesifik yang MAS dan perayu telah bersetuju sebagai subjek untuk pemindahan. Aset dan liabiliti seperti yang dinyatakan tidak termasuk liabiliti yang timbul daripada kehilangan penerbangan MH370. Mahkamah Tinggi telah menolak permohonan perayu atas alasan bahawa hubungan perayu dengan MAS sama ada ia akan menanggung liabiliti MAS secara keseluruhan atau sebahagiannya adalah tidak jelas. Justeru, rayuan ini.

Diputuskan, membenarkan rayuan; mengetepikan perintah Mahkamah Tinggi:

- (1) Kebergantungan responden-responden kepada perenggan kelima mukadimah Akta 765 untuk mewajarkan perayu sebagai pihak dalam tindakan ini jelas tidak kena dan tidak dapat dipertahankan. Mukadimah itu berguna atau boleh digunakan sebagai panduan kepada niat badan perundangan mana-mana statut. Selalunya ia membantu dalam mentafsir suatu statut. Mukadimah itu cara untuk membuka minda pembuat Akta Parlimen mukadimah itu menunjukkan kelemahan yang perundangan berniat untuk memperbetulkan (lihat perenggan 10–11).
- (2) Jikapun mukadimah Akta 765 bukan bahagian yang beroperasi, bagi tujuan menentukan niat badan perundangan Akta 765, mukadimah itu tidak patut dibaca secara berasingan, ia patut sebaliknya dibaca secara keseluruhan dan selari dengan tujuan Akta 765 yang telah digubal oleh Parlimen. Apabila ini dilakukan, ia menjadi jelas bahawa tujuan Akta 765 adalah untuk mengukuhkan perayu agar ia, antara lain, boleh menentukan keberterusan dan lain-lain dan memegang aset dan liabiliti tertentu MAS. Akta 765 menghendaki bahawa andaian sedemikian tentang aset dan liabiliti tertentu oleh perayu dan dijalankan dalam cara yang berkesan, cekap dan lancar melalui perintah peletakhakan (lihat perenggan 11).
- (3) Tiada liabiliti yang berkaitan dengan MH370 telah diberi atau dipindahkan kepada perayu menurut perintah peletakhakan yang dipersoalkan sepertimana diujah atau dikatakan oleh responden-responden. Ini juga selari dengan perjanjian antara MAS dan perayu di mana ia dengan nyata bersetuju, antara lain, bahawa perayu tidak patut memegang apa-apa liabiliti termasuk apa-apa tuntutan yang timbul daripada kerugian MH370 (lihat perenggan 12).
- (4) Aduan perayu adalah bahawa ia telah secara salah pli dalam tindakan ini dengan menekankan bahawa tuntutan responden terhadap perayu menunjukkan tiada kausa tindakan yang diiktiraf dari segi undang-undang dan bahawa ia adalah remeh, menyusahkan dan satu penyalahgunaan proses mahkamah. Tiada liabiliti dibuktikan atau ditentukan terhadap MAS berkenaan kehilangan MH370, oleh itu tiada liabiliti boleh dengan itu dipindahkan, diserahkan atau diberikan pada

- A perayu. Liabiliti MAS yang dikatakan itu, bukan liabiliti yang diandai atau diakui yang tertakluk kepada pemindahan kepada atau terletak hak pada perayu (lihat perenggan 13–14).
- B (5) Hakim Mahkamah Tinggi terkhilaf kerana mengandaikan bahawa MAS perlu berhenti untuk wujud, bahawa bertentangan dengan perintah peletakkan dan perjanjian, liabiliti dalam kes ini telahpun atau boleh dipindahkan kepada atau terletak hak dalam perayu dan bahawa akibat yang berpotensi kepada responden-responden MAS yang terhenti untuk wujud adalah satu faktor yang diambil kira dalam memutuskan sama ada tuntutan itu patut dibatalkan (lihat perenggan 22).
- C (6) Perayu dengan yakin membuktikan bahawa responden-responden telah salah meletakkan mereka dalam tindakan ini dan percubaan responden-responden untuk menyangkal fakta ini adalah tidak meyakinkan langsung. Ia jelas bahawa tindakan ini terhadap perayu dengan nyata suatu yang tidak boleh dikekalkan dan tiada peluang untuk berjaya (lihat perenggan 24).]
- D

Cases referred to

- E *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (refd)
Kekotong Sdn Bhd v Danaharta Urus Sdn Bhd [2003] 3 MLJ 1, CA (refd)
LCC v Bermondsey Bioscope Co Ltd [1911] 1 KB 445, KBD (refd)
Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors [1996] 1 MLJ 309, CA (refd)
- F *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16, SC (refd)
Re Application of Tan Boon Liat @ Allen; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1976] 2 MLJ 83 (refd)
- G *Sim Kie Chon v Superintendent of Pudu Prison & Ors* [1985] 2 MLJ 385; [1985] CLJ Rep 293, SC (refd)

Legislation referred to

- H Civil Law Act 1956 s 7
 Companies Act 1965
 Malaysian Airline System Berhad (Administration) Act 2015 s 29, 29(1)
 Malaysian Airline System Berhad (Administration) (Vesting Date) Order 2015 First Schedule
- I Rules of Court 2012 O 18 r 19, 19(1), (1)(a), (1)(b), (1)(d), (2)

Appeal from: Civil Suit No 21NCVC-51-08 of 2015 (High Court, Kuala Lumpur)

Logan Sabapathy (Sanjeev Kumar with him) (Sanjeev Kumar) for the appellants.

Sangeet Kaur Deo (Tan Chee Kian and Ngeow Chow Ying with her) (Ngeow & Tan) for the respondents. A

Idrus Harun JCA (delivering judgment of the court):

[1] Tan Ah Meng and Chuang Hsiu Ling @ Cindy Chuang ('the first and second deceased persons') were passengers on board flight MH370 which was operated by the first defendant departing from Kuala Lumpur International Airport on 8 March 2014 at approximately 12.40am and outbound for Beijing, China ('flight MH370'). Together with the first and second deceased persons on board the flight was Tan Wei Chew who was the eldest natural son of the first and second deceased persons ('the third deceased person'). The first and second respondents are the natural sons of the first deceased person whereas the third and fourth respondents are the parents of the first deceased person. The fifth respondent is the mother of the second deceased person. As fate would have it, the flight that in the normal course would be uneventful never arrived at the destination and to date the aircraft, all its passengers and crew personnel on board have not been located. B C D

[2] The respondents consequently commenced the present action by way of a writ of summons and statement of claim on 28 August 2015 against the appellant, the first, third, fourth and fifth defendants. So far as the respondents' claim relate to the appellant, who was the second defendant in the court below, it is the respondents' pleaded case that the appellant, pursuant to the Malaysian Airline System Berhad (Administration) Act 2015 ('Act 765') is deemed to have and will be taking over all liabilities of the first defendant ('MAS'). Before proceeding further, we may mention that the liabilities of MAS in this connection and based on the respondents' claim, are premised on a breach of contract and a breach of duty of care. The respondents in their statement of claim, inter alia, seek from the appellant and MAS, third, fourth and fifth defendants general damages, aggravated and exemplary damages as well as damages to be assessed for the loss of support suffered by the respondents as a result of the death of the first and second deceased persons pursuant to s 7 of the Civil Law Act 1956 or common law. E F G

[3] On 23 December 2015, the appellant filed an application pursuant to O 18 r 19 of the Rules of Court 2012 and the inherent jurisdiction of the High Court to strike out the respondents' writ of summons and statement of claim dated 28 August 2015 on the basis that the respondents had no cause of action against the appellant and that the claim against the appellant was frivolous, vexatious and an abuse of the process of the court. In essence therefore, the appellant is relying on r (1)(a), (b) and (d) of O 18 r 19 of the Rules of Court 2012. The application is founded in the main, on the argument that the appellant is an entity incorporated on 7 November 2014, eight months after H I

- A the occurrence of the incident involving flight MH370, that it is not referred to as a successor company of MAS under Act 765 and the transfer of assets and liabilities from MAS to the appellant as envisaged under Act 765 is limited to specific assets and liabilities that MAS and the appellant have agreed as being subject to transfer. The assets and liabilities so specified exclude the liabilities
- B arising from the loss of flight MH370. The application is supported by three affidavits affirmed respectively on 21 December 2015, 18 February 2016 and 29 February 2016. The respondents filed their affidavit in reply affirmed on 28 January 2016.
- C [4] The High Court dismissed the appellant's application on 30 March 2016 holding that the appellant's relationship with MAS as to whether it would wholly or partly assume MAS liabilities was not clear. The learned judge further added that the facts deposed in the affidavits were also not clear and therefore further evidence of in particular, the agreement reached between both parties
- D had to be adduced, so that the court could decide after considering all evidence adduced by the parties.
- E [5] The crucial issue on which the appeal turns is whether the appellant has any nexus or link, in law or in fact, with any of the causes of action pleaded by the respondents in connection with the loss of flight MH370. Consequently, the argument of learned counsel for the appellant next homed in on the critical factual question for our determination which is whether the appellant is wrongly impleaded as a party by the respondents in their action. The submissions of the appellant clearly was that there was no nexus or link, in law and on the facts, with any of the causes of action pleaded by the respondents in connection with the loss of MH370. The three principal reasons for that submission are:
- F
- G (a) the appellant was incorporated and came into existence only on 7 November 2014 after the loss of MH370 on 8 March 2014;
- H (b) the vesting order made on 1 September 2015 and *gazetted* on 6 November 2015 pursuant to s 29 of Act 765 made it plain that no liabilities in connection with MH370 were vested or transferred to the appellant; and
- I (c) the above effect of the vesting order was in line with the earlier sale of assets and liabilities agreement dated 21 August 2015 ('the agreement') between MAS and the appellant where it was expressly agreed, *inter alia*, that the appellant assumed no liabilities of MAS with respect to any other matter including, without limitation any claim, action or other liabilities arising from the total loss of MH370.

On the contrary, we were pressed by learned counsel for the respondents in this respect and in substance that the incorporation of the appellant to continue the

affairs of MAS was a strong indication that it was intended that MAS would cease to exist in due course rendering the future of MAS to be unclear.

A

[6] To appreciate the contentions that had been raised before this court, it would be desirable to examine briefly the material facts which, having gleaned from the affidavit in support of the application affirmed on 21 December 2015, reveal the uncontroverted fact that the appellant was incorporated pursuant to the Companies Act 1965 on 7 November 2014 which was some eight months after the loss of flight MH370 on 8 March 2014 circa 12.40am (exh A1). Act 765 came into force on 20 February 2015. The preamble to Act 765, inter alia, reads:

B

C

WHEREAS special provisions are required in the public interest to ensure the continuity of the essential air services by the Malaysian Airline System Berhad as the national carrier and the provision of uninterrupted connectivity to and from and within Malaysia by the national carrier:

D

AND WHEREAS legislation is the only means to expeditiously administer and manage the Malaysian Airline System Berhad, its wholly owned subsidiary companies and its partially owned subsidiary companies providing goods or carrying out services or both that are essential to the operations of the national carrier without disruption to their operations:

E

AND WHEREAS the establishment of a new entity, that is the Malaysia Airlines Berhad, with a new business model is critical to ensure continuity, profitability and viability, and *to assume certain businesses, property, rights, liabilities and affairs of the Malaysian Airline System Berhad*:

F

AND WHEREAS it is in the public interest to ensure the continued existence of a national carrier to facilitate Malaysia's economic development:

AND WHEREAS legislation provides an effective, efficient and seamless means to transition the business, property, rights, liabilities and affairs of the Malaysian Airline System Berhad to the new entity. (Emphasis added.)

G

[7] It is also legitimate to have regard at this stage to another crucial point which is that on 21 August 2015, MAS (as the vendor) and the appellant (as the purchaser) entered into the sale of assets and liabilities agreement ('the agreement') of which Recital (D) states that Act 765:

H

(D) ... provides, amongst others, the issuance of vesting orders to transfer and vest in the Purchaser *selected assets or liabilities* of the Administered Companies without any conveyance assignment or transfer whatsoever. (Emphasis added.)

I

Further in cl 2.2(b) and (c) of the agreement, it is stipulated that:

(b) The Parties acknowledge and agree that *the only liabilities of the Vendor to be assumed by the Purchaser are the Liabilities expressly transferred to the Purchaser in accordance with this Agreement. Nothing in this Agreement shall operate to transfer to*

A *the Purchaser any assets or rights of the Vendor other than those described in this Agreement.*

B (c) The Purchaser *assumes no liabilities* of the Vendor with respect to any other matter, including, without limitation: (i) the Litigation Matters; (ii) *any claim, action or other liabilities arising from the total loss of MH370 ...*; or (iii) any other liability, claim or action existing, or which is pending or threatened. (Emphasis added.)

C [8] In tandem with the agreement, and pursuant to s 29(1) of Act 765, a vesting order was made on 1 September 2015 and published on 6 November 2015 as *Gazette* Notification PU(A) 265/2015. We would necessarily mention that, the relevant provisions, that is, para 2 of the vesting order, expressly provides that all rights, titles and interests and liabilities of MAS as stated in the First Schedule shall be transferred and vested in the appellant. Having carefully
D read the vesting order, the only point of importance that has become apparent to this court is that the vesting order and the First Schedule thereto do not explicitly include but instead conspicuously omits any transfer of liability regarding the loss of flight MH370 from MAS to the appellant.

E [9] It is clear to us that the appellant has been impleaded solely on the respondents' assertions that because the fifth paragraph in the preamble to Act 765 states that Act 765 provides seamless means to transition the business, property, rights, liabilities and affairs of MAS to the appellant and that pursuant to Act 765, the appellant is 'deemed' to have or will be taking over all
F liabilities and affairs of MAS (paras 6 and 16 of the statement of claim).

G [10] We pause to observe at this point that the respondents' reliance on the fifth paragraph of the preamble to Act 765 to justify impleading the appellant as a party in this action is clearly misplaced as much as it is wholly untenable. First and foremost, it is trite law that though the preamble is a part of a statute, it is not an operative part thereof. The preamble cannot limit or change the meaning of the operative provision in a statute where the terms of a statute are clear, precise and unambiguous. The courts are in fact reluctant to allow a preamble to contradict plain words in the body of a statute. In *Re Application of Tan Boon Liat @ Allen; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1976] 2 MLJ 83, Abdoalcader J explained the effect of a
H preamble to a statute in the following terms:

I Although the preamble is a part of a statute, it is not an operating part thereof. The aid of the preamble can be taken only when there is some doubt about the meaning of the operative part of the statute. The preamble undoubtedly throws light on the intent and design of the enacting authority and indicates the scope and purpose of the legislation itself but it should not be read as a part of a particular section of that written law. Where the enacting part is explicit and unambiguous the preamble cannot be resorted to, to control, qualify or restrict it.

The above authoritative pronouncement was quoted with approval by this court in *Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd* [2003] 3 MLJ 1.

[11] Mindful of the above principle, we would also emphasise that the preamble is useful or may be used as a guide to the legislative intention of any statute. It is often of great assistance in construing a statute. The preamble is a key to open the minds of the makers of the Act of Parliament. The preamble indicates the mischiefs which the legislation intends to redress (*Bennion on Statutory Interpretation* at p 732; *LCC v Bermondsey Bioscope Co Ltd* [1911] 1 KB 445 at p 451). Pausing here, we would thus say that even if the preamble of Act 765 is not an operating part thereof, for the purpose of determining the legislative intent of Act 765, the preamble ought not to be read in isolation, it should instead be read in totality and consonant with the purpose for which Act 765 has been enacted by Parliament. When this is done, it becomes clear that the purpose of Act 765 is to establish the appellant so that it, amongst others, can ensure continuity etc and assume certain assets and liabilities of MAS, Act 765 requires that such assumption of certain assets and liabilities by the appellant will be carried out in an effective, efficient and seamless means by way of a vesting order.

[12] The third paragraph of the preamble to Act 765 clearly states that the establishment of the appellant is 'to assume *certain* business, property, rights, *liabilities* and affairs' of MAS. In our judgment, it is beyond question that the point of importance that has emerged is that the third paragraph of the preamble envisages the vesting of specified and identified rights and liabilities from MAS to be vested in the appellant. The operative provision in Act 765 concerning the vesting of rights and liabilities is found in the vesting provisions under s 29(1) which provides for a vesting order to be published in the *gazette* that would vest properties or liabilities of MAS specified by the Minister to and in the appellant. Section 29(1) of Act 765 provides as follows:

29(1) The Minister may, from time to time, by order published in the *Gazette*, appoint a vesting date for each order and on such date any property or liabilities of the Administered Companies specified by the Minister in such order shall be transferred to and vested in the Malaysia Airlines Berhad without any conveyance, assignment or transfer whatsoever.

Such vesting, as envisaged under s 29 of Act 765, was made, as aforesated, through the vesting order dated 1 September 2015 which was later *gazetted* on 6 November 2015 as PU(A) 265/2015. We would once again emphasise, and indeed there is not the slightest room for doubt, that no such liabilities in connection with MH370 has been vested in or transferred to the appellant pursuant to the vesting order in question as contended or alleged by the respondents. This is also consonant with the agreement between MAS and the

A appellant where it is expressly agreed, inter alia, that the appellant shall not assume any liabilities including any claims arising from the loss of MH370. This is found in cl 2.2(c) of the agreement (exh A2).

B [13] The appellant's complaint is that it has been wrongfully impleaded in this action stressing that the respondents' claim against the appellant discloses no cause of action recognised in law and that it is frivolous, vexatious and an abuse of court process. The only two paragraphs in the statement of claim referring to the appellant that is paras 6 and 16, assume that the appellant has or will be taking over, all liabilities and affairs of MAS under Act 765. It is abundantly clear that such assumption is erroneous and without basis as the unambiguous effect of the vesting order under s 29(1) of Act 765 and the agreement manifestly show that no liabilities concerning the loss of MH370 has been transferred by MAS to the appellant. Suffice to say that any liability, if established or determined, can only be transferred, assigned or vested in another party either by an agreement or by operation of law.

[14] In the present factual setting, no liability has been established or determined against MAS with regard to the loss of MH370, so no liability can therefore be transferred, assigned or vested in the appellant. The alleged liability of MAS, as it is clear to us, is not assumed or acknowledged liability which is subject to a transfer to or vesting in the appellant. It is pertinent to note that from the contemporaneous documents, the appellant, as an entity, was not in existence at the time of the incident on 8 March 2014. The appellant was only incorporated on 7 November 2014. The appellant therefore could not have assumed any responsibility or liability or owed any duty of care in law to the deceased persons at the material time nor could there be any transfer of liability which had not yet been established against MAS to the appellant. Even if liability against MAS is eventually established, it is patent that both MAS and the appellant by agreement had agreed that any claim, action or liabilities in connection with the loss of flight MH370 will remain with MAS and will not be assumed by the appellant. Act 765 moreover provides for the vesting of any rights and liabilities from MAS in the appellant by way of a vesting order. But, the vesting order dated 1 September 2015 does not vest or transfer any liability in connection with the loss of flight MH370 to the appellant. It is thus clear that the claim against the appellant is unsustainable.

I [15] It has been stated that the correct question in an application under O 18 r 19 of the Rules of Court 2012 is whether, when the case is argued on the affidavit evidence available, it is plain and obvious that the case has no chance of success or is bound to fail. Reference in this connection may be made to *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16 and *Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland*

(*Sabah Sdn Bhd & Ors* [1996] 1 MLJ 309 in support of the above proposition. A

[16] The well-established principle upon which the court acts in exercising its power to strike out pleadings under O 18 r 19(1) of the Rules of Court 2012 is that, pleadings may be struck out only and only if the court is satisfied that the claim is on the face of it obviously unsustainable. The burden to prove that the case is plain and obvious rests with the appellant. Thus, in the Supreme Court's case of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7 it was emphasised that: B C

The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the Rules of the High Court 1980 are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule. This summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable. D

[17] Similarly, in *Sim Kie Chon v Superintendent of Pudu Prison & Ors* [1985] 2 MLJ 385; [1985] CLJ Rep 293, the Supreme Court held that:

On an application to strike out a statement of claim under O 18 r 19 of the Rules of the High Court, the right course for the Court to take is to strike out the claim if it is satisfied that the claim does not disclose a reasonable cause of action. E

[18] In coming to his decision, the learned judge stated that the question of whether MAS's liabilities in relation to the loss of MH370 had been or could be transferred to or vested in the appellant was one that could not be answered based on the affidavits. Accordingly, evidence had to be led at trial, in particular with regard to the agreement. In so finding, the learned judge appeared to have been swayed by the respondents' submissions that the establishment of the appellant as a new entity to continue MAS future was unclear and that MAS would cease to exist in the near future. This would prejudice the respondents and render their claim meaningless. This assertion is to our minds, untenable as it is entirely speculative. The learned judge had either mistaken those inferences of the respondents for matters of facts established on the affidavit evidence and had improperly accepted those inferences, or had improperly assumed that the respondents would be able to establish those matters at trial. It does seem obvious to this court that no consideration was given by the learned judge to the fact that liabilities can only be transferred to or vested in another party by agreement or by operation of law. To this end, the vesting order is clear that there is no transfer of liabilities relating to the loss of MH370 from MAS to the appellant. F G H I

[19] The learned judge had also stated that under s 29(1) of Act 765 the Minister could vest in the appellant at any time, all liabilities, including those

A relating to the loss of MH370. His Lordship's reasoning showed yet again a
manifest failure to consider the unambiguous effect of the said vesting order. In
addition, His Lordship had completely failed to take into account the effect of
the third paragraph of the preamble in Act 765 which clearly states that the
appellant is 'to assume *certain* business, property, rights, *liabilities* and affairs' of
B MAS only.

[20] It ought to be highlighted that the learned judge had also stated that the
appellant's reference to the agreement to absolve the appellant of liability was
C prejudicial and could not be binding on third parties. With due respect to the
learned judge, we would say, and at the risk of repetition, that even if the
agreement could not be binding on third parties, MAS liabilities in connection
with the loss of MH370 could only be transferred to or vested in the appellant
by agreement or by operation of law. The vesting order is unequivocal in this
D respect. The learned judge manifestly failed to consider the evidence in totality
and in particular His Lordship had omitted to take into account the effect of
the legislative intent of Act 765 is to vest only certain liabilities of MAS to the
appellant and the vesting order clearly does not include MAS liabilities in
respect of the loss of MH370.

E [21] A trial of this action would not reveal or add anything more to what was
already before the High Court. Further, it is difficult to see what evidence could
have any bearing on the interpretation of the vesting order and cl 2.2(c) of the
agreement. Accordingly, and in the absence of disputes over the evidence, all
F that the High Court had to do was to interpret s 29 of Act 765, the vesting
order and cl 2.2(c) of the agreement. Had the learned judge done so, there
should be no reason for His Lordship to ignore a logical and correct
interpretation of those materials that would show that it was not only a
straightforward matter but also one where the claim is on the face of it
G obviously unsustainable that would have led to the claim against the appellant
being struck out.

[22] We are consequently led to one glaring conclusion which is that the
learned judge had erred in assuming that MAS would necessarily cease to exist,
H that contrary to the vesting order and the agreement, the liability in this case
had been or could be transferred to or vested in the appellant and that the
potential consequences to the respondents of MAS's ceasing to exist was a
factor to be taken into account in deciding whether the claim should be struck
out. In sum, the learned judge did not direct himself according to the correct
I and well-established approach in dealing with an application under O 18 r 19
of the Rules of Court 2012 in failing to accord due consideration and weight to
the vesting order, the agreement and the application of Act 765 in particular
the third paragraph of the preamble to and s 29(1) of Act 765 which when
considered together would have shown that the appellant has absolutely no

nexus both in law and in fact with any of the causes of action pleaded by the respondents in connection with the loss of flight MH370.

A

[23] It ought to be mentioned that, in this regard, the appellant's solicitors had, vide their letter dated 9 October 2015 (exh 'A2'), intimated to the respondents' solicitors that the appellant had no nexus to the incident or any liability that might arise from it and had further produced the redacted copy of the agreement exhibiting the extracts of the relevant clauses. The respondents' solicitors were invited to advise the respondents to withdraw the action against the appellant. That was however, to no avail as the respondents' solicitors' reply of 4 November 2015 (exh 'A3') had indicated that they would not withdraw the claim against the appellant. The letter insisted that Act 765 'provides specifically for a vesting order to be drawn up and *gazetted* for any transfer of property and/or liabilities' and that 'terms relating to the inclusion or exclusion of liabilities transferred to MAB should be contained in a Vesting Order and not a Confidential Agreement between the two entities'. In the light of the respondents' insistence that the crucial document that would clarify the inclusion or exclusion of transferred liabilities being the vesting order under Act 765, the timely *gazetting* of the vesting order through *gazette* notification on 6 November 2015 two days after the respondents solicitors' letter of 4 November 2015, explicitly did not include any transfer of liability regarding the flight MH370 incident to the appellant. The respondents, notwithstanding the clear evidence provided by the appellant to them, nevertheless have continued to prosecute this action against the appellant. Such action is in our judgment frivolous, vexatious and an abuse of the process of the court. We would refer to the decision in *Raja Zainal Abidin bin Raja Haji Tachik*, which, in considering the law on striking out of pleadings, the Federal Court authoritatively held as follows:

B

C

D

E

F

It is to be remembered that the High Court always has an inherent jurisdiction to prevent abuse of its process irrespective of whether it is expressly called for or not in an application under O 18 r 19 unless such application is limited solely to the ground that any pleading does not disclose a reasonable cause of action or defence as the case may be.

G

[24] It is plain that the instant application is not limited solely on the ground set out in r (1)(a) of O 18 r 19 for which r (2) thereof does not allow any evidence to be admitted and instead the same must be based on the face of the claim (*Bandar Builder*). The appellant additionally relies on the grounds stated in paras (b) and (d) of O 18 r 19(1) which allow the court to consider the affidavits and documentary evidence exhibited thereto filed by the parties in determining whether the claim is on the face of it obviously unsustainable. Having done so, we are satisfied that the appellant has convincingly established that the respondents have wrongly impleaded them in this action and the respondents' attempt to refute this fact is, in our judgment, completely

H

I

- A** unconvincing. It is now obvious to us that this action against the appellant is eminently one that is plainly unsustainable and has no chance of success. For all these reasons, we are of the view that the appeal ought to be allowed with costs. We would accordingly allow the notice of application dated 23 December 2015 in prayer (1). The order of the learned judge dated 30 March 2016 is hereby set aside and substituted with an order that the respondents' writ of summons and the statement of claim dated 28 August 2015 against the appellant is struck out.
- B**

Appeal allowed; order of High Court set aside.

C

Reported by Afiq Mohamad

D

E

F

G

H

I